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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-674

BALDWIN-LIMA-HAMILTON CORPORATION,
Petitioner,

—versus—

THE AETNA CASUALTY & SURETY CO., AMERICAN EMPLOYERS' INSURANCE COMPANY and EMPLOYERS' FIRE INSURANCE COMPANY,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner replies to the points in Respondents' brief in the order in which they are raised.

POINT I

The petition for certiorari challenges the action of the Supreme Court of Connecticut in adopting as conclusive an administrative determination of fact obtained *ex parte* without notice or hearing. The Connecticut statutes involved are silent on the right to notice or hearing. The petitioner, therefore, does not challenge the validity of any

statute on its face, but rather attacks the administrative and judicial actions of the State of Connecticut which contravened petitioner's basic right to notice and hearing under the Fourteenth Amendment to the United States Constitution.

POINT II

The Connecticut Supreme Court has held that Connecticut state law authorized the trial court to give conclusive effect to an *ex parte* administrative determination. We do not ask this Court to "revise" the Connecticut Court's interpretation of state law. We ask that it declare the procedure sanctioned by the Connecticut Court to be a violation of petitioner's right to procedural due process.

POINTS III AND IV

It is undisputed that the petitioner's Fourteenth Amendment claim relating to notice and hearing was raised in the pleadings. (App. to Pet. F-1—F-2). Respondents state that the due process issue must be deemed not to have been pressed in the trial court because it was not mentioned in that Court's opinion. This is not correct. Under Connecticut practice the trial court is required to set forth in its finding the claims of law made by the appellant and overruled at trial. Conn. Prac. Book (1963) §§ 635, 652. Petitioner's due process claims under the Fifth and Fourteenth Amendments to the Constitution of the United States appear in paragraphs 112-115 and 131 of the finding (App. to Pet. F-2—F-4) and include, specifically, the following:

> "Notice and the opportunity to act upon it must be granted at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965)." (App. to Pet. F-3, par. 115)

With respect to the claim that the issue was not raised on appeal as required by the Connecticut Practice Book or

argued in the Supreme Court, we refer the Court to the Appendix to the Petition, F-4—F-6. The overruling of petitioner's constitutional claims was assigned as error (App. to Pet. F-4); the STATEMENT OF ISSUES in petitioner's brief in the Connecticut Supreme Court expressly refers to the *"ex parte"* nature of the certificate of the Attorney General (App. to Pet. F-5); and the due process issue was briefed (App. to Pet. F-6). The Connecticut Supreme Court chose not to discuss this and other claims made by petitioner, holding that "the correctness of the [Attorney General's] decision is not at issue." (App. to Pet. C-8)

We frankly cannot follow respondent's argument about a possible state law basis for the Connecticut Supreme Court's decision. The court below flatly refused to consider the *merits* of petitioner's argument to the effect that the date of final settlement occurred on April 3, 1961 when the prime contractor's claim for extras was denied. Instead the Court rested its decision squarely on the proposition that petitioner had no right to be heard at all with respect to the question of when final settlement occurred. In refusing to review the certificate, the Court necessarily rejected petitioner's contention that conclusive effect could not constitutionally be given to an administrative determination made without notice and hearing.

POINT V

The issue raised by the petition for certiorari is clearly not "moot." Petitioner has been deprived of a contractual right which, with interest, has a value in excess of $1,000,000.

The fact that the Miller Act and Connecticut's "Little Miller Act" have both been amended to eliminate the cumbersome certification procedure involved in the present case is immaterial. The issue is whether petitioner has been deprived of its constitutional rights.

Questions involving a person's *fundamental* right to notice and hearing prior to adjudication of his rights have always been of the utmost importance to this Court (see Pet. pp. 11-12). Numerous state and federal statutes purport to clothe public officials with the power to make conclusive decisions affecting private rights. This Court should declare that where such a statute does not provide for notice and hearing, the federal Constitution affords such a right.

POINT VI

The Connecticut statutes provided no administrative remedy by which petitioner could have sought review by the Attorney General of his own certificate. Furthermore, there was no statute of general application providing for either administrative or judicial review of administrative decisions.

POINT VII

Petitioner has never claimed that it should be heard with respect to how much the government owes a contractor. It has no interest in that issue. It does have a vital interest in a subsequent determination of the *date* on which final settlement occurred when that determination is made for the sole and exclusive purpose of establishing whether petitioner is barred from pursuing its contractual rights against sureties on a payment bond.

Respectfully submitted,

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